

Doc. 95-42

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July 28, 1989

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(213) 628-8000  
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350 PARK AVENUE  
NEW YORK, NEW YORK 10022-6022  
(212) 888-1199  
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MAY 17 1995

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Mr. Alex D. Felker  
Chief  
Mass Media Bureau  
Federal Communications Commission  
1919 M Street, Northwest  
Room 314  
Washington, D. C. 20554

In re: Request of A. C. Nielsen Company for  
Permissive Authority to Use Line 22 of  
"Active Portion" of Television Video Signal  
for Transmitting Encoded Advertising and/or  
Program Identification Information, Filed by  
Letter of Counsel Dated July 19, 1989.

Dear Mr. Felker:

This law firm represents Airtrax, a general partnership organized under the laws of the State of California ("Airtrax"), which has developed and is in the process of bringing to market a system for utilizing Line 22 of the television active video signal for the purposes of encoding, storage, retrieval, and transmission of television advertisement broadcast verification data and related information.

By a letter dated November 6, 1986 to the undersigned, as communications counsel to Republic Properties, Inc. ("Republic"), an affiliate of Airtrax, the Commission's staff, acting pursuant to delegated authority, authorized Republic to use Line 22 for the encoding, storage, retrieval, and

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Mr. Alex D. Felker  
July 28, 1989  
Page 2

transmission of television advertisement broadcast verification information. This authority was subsequently transferred from Republic to Airtrax, and the Commission's qualified assent to such transfer was confirmed in a letter from the Commission's staff to Schuyler M. Moore, Esquire, of the law firm of Gipson, Hoffman and Pancione of Los Angeles, California, counsel to Airtrax, dated August 28, 1987.

It has recently come to the attention of Airtrax that by a letter to you from its communications counsel dated July 19, 1989, A. C. Nielsen Company ("Nielsen") has asked for the Commission's

. . . permissive authority to use line 22 of the "active portion" of the television video signal for the purpose of transmitting encoded advertising and/or program identification signals. . . .

*Id.* at page 1.

Counsel's referenced letter further represents that

[d]ue to the nature of Nielsen's business, it is imperative that it receive as soon as possible the permissive authority requested herein. . . .

*Id.* at page 3.

The purpose of this letter, which is being submitted to the Commission on behalf of Airtrax, is to request the Commission to defer action upon Nielsen's request, pending the Commission's receipt and consideration of further information concerning the nature of Nielsen's proposed use of the requested permissive authority for the utilization of Line 22.

In the July 19 request filed by Nielsen's counsel, it is stated that Nielsen's proposed use of the requested permissive authority to occupy Line 22 will conform to the Commission's two (2) conditions that were set forth in an earlier grant of a similar authority to TeleScan, Inc., viz.,

. . . first, television licensees were required to retain ultimate control over their transmissions and would not be required to transmit the TeleScan signals; and second, the TeleScan signals must not produce degradation of the television service received by viewers. . . .

Mr. Alex D. Felker  
July 28, 1989  
Page 3

*Id.* at page 2 (underscoring in original; italics supplied).

Counsel goes on to state that Nielsen's proposed "AMOL" system for the encoding and use of Line 22 will conform to both of the above-described conditions. More specifically to the point, counsel represents that

. . . television licensees will retain ultimate control over their transmissions and are not required to transmit the AMOL signals *outside of their contractual agreements with Nielsen and programmers.* . . .

*Id.* at page 2 (emphasis supplied).

Counsel's artful wording leaves open the distinct possibility that television station licensees may be divested of "ultimate control over their transmissions" within the terms of "their contractual agreements with Nielsen and programmers."

In its extensive discussions with representatives of national television networks, national television programming syndicators, advertising agencies, national television advertisers, and station licensees over the past several months, Airtrax has been made aware that as a result of Nielsen's dominant position as the leading national television viewership measurement and audience ratings service, Nielsen is in a position to exert influence upon networks and upon program syndicators to cause them to encode Line 22 of the television active video signal in advertising messages included within programs supplied by such networks and syndicators to individual station licensees, using Nielsen's own AMOL system.

The networks and program syndicators would then be expected to invoke the non-performance, cancellation, and/or non-renewal provisions of their affiliation agreements and their syndicated program exhibition licensing agreements, respectively, with individual television station licensees, in order to induce the licensees to broadcast the AMOL-encoded Line 22 portion of advertising messages included within programs provided to the licensees by the networks and by the syndicators, even in circumstances where there is a consensus between the affected network or syndicator and the licensee (and perhaps also the affected advertising agencies and advertisers whose messages are being carried in such programs)

Mr. Alex D. Felker  
July 28, 1989  
Page 4

that the AMOL system is not desired because it would preclude the use of Line 22 by such stations for a preferred purpose.\*/

Airtrax intends to submit a more complete written exposition of these concerns to the Commission within the next ten (10) days. In the meantime, Airtrax requests the Commission not to take precipitous action on the July 19 request of Nielsen's counsel, unless and until a more complete factual record shall have been developed concerning Nielsen's plans for its use and marketing of its AMOL system, and in particular concerning the questions (i) what is meant by Nielsen's representation that individual television station licensees "are not required to transmit the AMOL signals *outside of their contractual agreements with Nielsen and programmers,*" and (ii) whether Nielsen's plans present the risk that such licensees may, in reality, be confronted with substantial practical constraints upon, and disincentives to the free exercise of, their nominal contractual right to refuse to transmit AMOL-encoded Line 22 signals in advertisements contained in programs supplied to such licensees by television networks and television program syndicators.

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\*/ Airtrax is aware that under conventional network affiliation agreements and syndicated program exhibition licensing agreements, an individual television station licensee cannot be contractually compelled to broadcast material against its will. See, e.g., Section 73.658(e) of the Commission's Rules and Regulations, 47 C.F.R. Section 73.658(e) (1988).

On the other hand, Airtrax trusts that the Commission is not so naive as to believe that a persistent exercise by a station licensee of its contractual right to reject (because of AMOL encoding of Line 22, or otherwise) commercial advertisements inserted into programming provided to the station by its network or by a program syndicator would not eventually jeopardize that station's continued network affiliation or its continued relationship with its syndicated programming supplier, respectively.

Airtrax submits respectfully that the mere existence of a contractual right--which cannot be regularly or repeatedly exercised without risking substantial damage to the overall business prospects of the station--is nothing more than a hollow legal formality lacking practical, "real-world" substance.

Mr. Alex D. Felker  
July 28, 1989  
Page 5

Airtrax acknowledges Nielsen's expression of its perceived need for promptness in obtaining the Commission's action upon the July 19 request, but Airtrax submits that the preservation to individual television station licensees, as public trustees charged with serving the public interest, of their freedom and ability to discharge their public-interest responsibility to determine what material shall and shall not be transmitted by their stations necessitates that a more complete record be developed prior to Commission action on Nielsen's request.

Airtrax observes that the filing of Nielsen's July 19 request only came to Airtrax's attention within the past few days, and that Airtrax is moving, and will continue to move, as expeditiously as possible in order to present its concerns to the Commission in this matter.

In view of the manifest potential for a substantially-adversarial posture between the parties to this proceeding, Airtrax respectfully requests the Commission to designate this proceeding as a "restricted proceeding," pursuant to Section 1.1208(c)(5) of the Commission's Rules and Regulations, 47 C.F.R. Section 1.1208(c)(5) (1988), and to apply its so-called "*ex parte*" rules accordingly.

In the event that the Commission should have any questions concerning this matter, kindly direct them to the undersigned communications counsel to Airtrax.

Very truly yours,

  
John G. Johnson, Jr.

cc: Grier C. Raclin, Esquire (by hand)  
Counsel to A. C. Nielsen Company

Roy J. Stewart, Esquire (by hand)  
Chief, Video Services Division, Mass Media Bureau,  
Federal Communications Commission  
1919 M Street, Northwest, Room 702

Stephen F. Sewell, Esquire (by hand)  
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Mr. Alex D. Felker  
July 28, 1989  
Page 6

Clay C. Pendarvis, Esquire (by hand)  
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